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NO. 82-779

# In the Supreme Court of the United States

OCTOBER TERM, 1982

HARRY J. HOLMES,

Petitioner

vs.

J. RAY McDERMOTT & CO., INC.

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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A. Questions presented for review:

1) Whether an injured seaman's claim for attorney's fees, resulting from his Jones Act employer's wilful and arbitrary termination of maintenance and cure, precludes the judgment entered on the jury's award of general damages from being a final judgment where prior to trial all parties agreed to reserve the amount of any such fees to later determination by the District Judge; and

2) Whether, as a practical procedural matter, attorney's fees should be determined during the trial of liability and general damages issues where the attorney's fees do not change the judgment, but are merely due because of the judgment, and to require proof of them during the trial would permit pre-trial in-

vasions of an attorney's work-product and attorney-client confidences.

B. List of parties:

a) Harry J. Holmes; and

b) J. Ray McDermott & Co., Inc. (now legally known as McDermott, Inc.).

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Gaspard v. Taylor Diving & Salvage Co., Inc., 649 F.2d 372 (5th Cir. 1981);

Hidell v. International Diversified Interests, 520 F.2d 529, fn. 4 (7th Cir. 1975);

Holmes v. J. Ray McDermott & Co., Inc., 682 F.2d 1143 (5th Cir. 1982);

Incandela v. American Dredging Co., 659 F.2d 11 at 15 (2nd Cir. 1981);

The Iroquois, 194 U.S. 240, 24 S.Ct. 640, 48 L.Ed. 955;

Kraljic v. Berman Enterprises, Inc., 575 F.2d 412 (2nd Cir. 1978);

Lipscomb v. Wise, 643 F.2d 319 (5th Cir. 1981);

Mackey v. National Steel Corp., 292 F. Supp. 222, 232 (N.D. Ohio 1967);

Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131 (6th Cir. 1980);

Obin v. District No. 9, etc., 651 F.2d 574 (8th Cir. 1981);

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Robinson v. Pocahontas, Inc., 477 F.2d 1048 (1st Cir. 1973);

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Swanson v. American Consumer Industries, Inc., 517 F.2d 555 (7th Cir. 1975);

Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 88 (1962);

White v. New Hampshire Department of Employment Security, ____ U.S. ____, 102 S.Ct. 116 (1982) [50 U.S. Law Week 4255, March 2, 1982].

E. Jurisdiction of this Court:

1) The decision and judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 9, 1982;

2) No rehearing or extension of time was requested;

3) No cross-petition for writ of certiorari is believed to have been filed or contemplated; and

4) Jurisdiction is believed conferred by 28 U.S.C. Section 2101(c).

F. Constitutional provisions, treaties, statutes, etc.:

None.

G. Statement of the case :

On May 8, 1977, Harry Holmes was employed by McDermott as a rigger and was working aboard McDermott's Lay Barge No. 23 when his back was injured while he and several other crew members were

carrying a heavy steel cable. On August 24, 1977 suit was filed in the United States District Court for the Eastern District of Louisiana on behalf of Harry J. Holmes against J. Ray McDermott & Co., Inc. pursuant to the Jones Act and the General Maritime Law. In addition to his demand for general damages, Mr. Holmes also asserted a claim for maintenance and cure and for damages and attorney's fees for failure to pay same. McDermott answered the lawsuit with a general denial. This case proceeded to trial on June 1, 1981. On June 5, 1981 the jury found that the injury was caused by the negligence of McDermott and the unseaworthiness of the vessel, and also found that McDermott "wilfully and arbitrarily" terminated Mr. Holmes' maintenance and cure benefits, awarding an additional amount for damages

on this issue. Finally, the jury found that attorney's fees were due. On June 9, 1981, the District Court entered judgment based on the jury's verdict, reserving the setting of the amount of the attorney's fees for later determination by the District Judge, a procedure which had been agreed to by all counsel and the Court prior to the close of evidence. McDermott then filed post-trial motions for judgment notwithstanding the verdict, new trial and/or remittitur on June 19, 1981, but failed to serve them until June 22, 1982, which was not within the ten days prescribed by Rule 59 of the Federal Rules of Civil Procedure. Plaintiff then promptly filed a "Motion to Dismiss Defendant's Post-Trial Motions" on grounds of untimeliness. On July 22, 1981, the District Court heard argument as to the timeliness issue and ordered

briefs as to whether or not the judgment entered on June 9, 1981, was final. By Minute Entry dated August 7, 1981, the District Court, holding that the judgment was final, granted plaintiff's "Motion to Dismiss Defendant's Post-Trial Motions", and, in the alternative, denied all of the defendant's post-trial motions. On August 7, 1981, McDermott filed its notice of appeal. Oral argument was heard on May 26, 1982, and on August 9, 1982 the Fifth Circuit dismissed the appeal after finding that the judgment was not final. Taking issue with the Fifth Circuit's finding, Mr. Holmes petitions for a writ of certiorari.

H. Review of state court judgment:

None.

I. Federal court jurisdiction:

Suit was filed asserting a claim under the Jones Act, 46 U.S.C. Section 688, with federal jurisdiction founded on 28 U.S.C. Sections 1331, 1333 and/or 1337.

J. Argument on "finality":

If a seaman proves entitlement to maintenance and cure, and if the Jones Act employer is found to have withheld those benefits "wilfully and arbitrarily", then, and only then, is the seaman entitled to also recover attorney's fees as the prevailing party. There is thus absolutely no legal difference between the seaman's "judicially" created right to attorney's fees under the general maritime law and any citizen's "statutorily" created right to attorney's fees under the Civil Rights Act. Yet the Fifth Circuit has here attempted to create

a difference by factually distinguishing the clear holding of a recent U.S. Supreme Court decision. Compare Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L. Ed. 2d 88 (1962) with White v. New Hampshire Department of Employment Security, __ U.S. ____, 102 S.Ct. 1162 (1982) [50 U.S. Law Week 4255, March 2, 1982], and with the decision below, Holmes v. J. Ray McDermott & Co., Inc., 682 F.2d 1143 (5th Cir. 1982).

While Vaughan v. Atkinson does not discuss attorney's fees in connection with finality of a judgment on the merits, it does distinguish between "damages" and "necessary expenses", and includes attorney's fees as a "necessary expense", not as a part of the "claim for damages for the suffering and for the physical handicap which follows ..."

82 S.Ct. at 999. In fact, despite the development of maritime law over the centuries, we were unable to locate any U.S. Supreme Court case indicating procedurally whether the injured or ill seaman must prove the amount of attorney's fees before he prevails on the merits of the maintenance and cure claim. We find, instead, a groping by lower courts on how to procedurally resolve the seaman's attorney's fees dispute.

For instance, some of the approaches include:

1) jury decides "callousness" and the Court decides the amount. Incandela v. American Dredging Co., 659 F.2d 11 at 15 (2nd Cir. 1981);
2) jury or judge awards attorney's fees as part of punitive damages award. Robinson v. Pocahontas, Inc., 477 F.2d 1048 (1st Cir. 1973);

Pine v. Protection Maritime Ins. Co., Ltd., 490 F. Supp. 277 (D. Mass. 1980);

3) award of attorney's fees is the only punitive damage award. Kraljic v. Berman Enterprises, Inc., 575 F.2d 412 (2nd Cir. 1978);

4) no jury award of fees because no proof. Blanchard v. Cheramie, 485 F.2d 328 (5th Cir. 1973);

5) no judge award of fees because of no proof. Sams v. Haines, 299 F. Supp. 746 (S.D. Ga. 1969);

6) jury tried Jones Act and unseaworthiness issues; judge tried "callousness", maintenance, cure and fee issues. Richard v. Bauer Dredging Co., Inc., 433 F.2d 954 (5th Cir. 1970);

7) all issues tried by the judge. Constance v. Johnston Drilling Company, 422 F.2d 369 (5th Cir. 1970);

8) jury award of $296,240.00 as compensatory damages for wilful refusal to provide maintenance and cure including an unspecified amount for attorney's fees, reinstated on appeal. Gaspard v. Taylor Diving & Salvage Co., Inc., 649 F.2d 372 (5th Cir. 1981);

9) attorney's fees awarded by judge as 40% of wages, maintenance and interest. Catrakis v. Nautilis Petroleum Carriers Corp., 427 F. Supp. 255, 260 (S.D. N.Y. 1977); and

10) claim for attorney's fees is merely derivative of the maintenance and cure claim. Mackey v. National Steel Corp., 292 F. Supp 222, 232 (N.D. Ohio 1967).

Several implicit conflicts deserve resolution, such as whether the judge or the jury decides all the issues, whether the jury decides the merits and

damages with the judge determining the fees, see Incandela, 659 F.2d at 15, notes 3 and 4, whether the fees are compensatory or punitive, and the proofs required. At the root of all this uncertainty and conflict lies the absence of a definitive ruling on the nature of the seaman's claim for attorney's fees. The resolution is in the White holding: a judgment exclusive of attorney's fees is final because the claim for attorney's fees "does not imply a change in the judgment, but merely what is due because of the judgment."

____ U.S. at____, 102 S.Ct. at 1166 [50 U.S. Law Week at 4257]. This principle should be applied to any claim for attorney's fees which are recoverable only after the party prevails on the merits, whether brought by a citizen for vindication of his civil rights or by a seaman for

recognition of his ancient maritime remedies. In both cases the fees are not recoverable until after the party prevails.

In this case below, the Fifth Circuit panel was faced with seemingly inconsistent prior decisions on the finality of judgments with pending attorney's fees awards, and therefore attempted to divine some principle from the maze by creating the integral-part-of-the-merits versus costs-or-collateral dichotomy without any Supreme Court support. Such a distinction, however, flies in the face of the White principle and the practicalities of the situation for at least two reasons: first, while the White case arose under 42 U.S.C. § 1983 one of the reasons supporting the ruling applies equally to the seaman's claim here:

> "Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits -- an inquiry that cannot even commence until one party has 'prevailed'." 102 S.Ct. at 1166;

Secondly, attorney's fees are distinguishable from the other elements of the seaman's maintenance and cure claim as pointed out in Vaughan v. Atkinson,

> "While failure to give maintenance and cure may give rise to a claim for damages for the suffering and for the physical handicap which follows (The Iroquois, 194 U.S. 240, 24 S.Ct. 640, 48 L.Ed. 955), the recovery may also include 'necessary expenses'. Cortes v. Baltimore Insular Line, 287 U.S. 367, 371, 53 S.Ct. 173, 174, 77 L.Ed. 368." 369 U.S. at 530, 82 S.Ct. at 999.

Emphasizing these differences, the Court in White also noted: "Nor can attorney's fees fairly be characterized as an element of 'relief' indistinguishable from other elements", 102 S.Ct. at 1166, a distinction not recognized by the Fifth

Circuit. In essence, the Court in Cortes, Vaughan and White noted the obvious: there is a substantial difference between damages and attorney's fees.

In addition to civil rights cases, appellate courts in other types of cases have also held that the finality of a judgment on the merits is not affected by a pending resolution of the amount of applicable attorney's fees:

1) breach of contract case -- attorney's fees are collateral and independent. Obin v. District No. 9, etc., 651 F.2d 574 (8th Cir. 1981);

2) securities litigation -- attorney's fees from class member's fund are treated separately. Boeing Company v. Van Gemert, 100 S.Ct. 745 (1980); and attorney's fees are merely

incidental -- Swanson v. American Consumer Industries, Inc., 517 F. 2d 555 (7th Cir. 1975) and Hidell v. International Diversified Interests, 520 F.2d 529, fn. 4 (7th Cir. 1975);

3) commercial guarantees -- judgment is final even though attorney's fee is undetermined. Memphis Sheraton Corp v. Kirkley, 614 F.2d 131 (6th Cir. 1980);

4) patent case -- order disposing of merits is final even though attorney's fees not calculated. DeLong Corp. v. Raymond International, Inc., 622 F.2d 1135 (3rd Cir. 1980);

5) claim to Indian lands -- attorney's fees are a collateral matter appealable before the merits are determined. Preston v. United States, 284 F.2d 514

(9th Cir. 1960);

6) voting rights case -- denial of fees appealable as collateral and incidental. Lipscomb v. Wise, 643 F.2d 319 (5th Cir. 1981)

To reluctantly employ a hackneyed phrase, the Fifth Circuit in Holmes made a distinction without a difference. White should be applied to a seaman's maintenance and cure claim, not distinguished from it.

Argument on "practical procedure": Turning then to a consideration of some of the practical and procedural aspects of the Fifth Circuit's Holmes decision, it creates more problems than it solves. By holding that the attorney's fees issue is part of the substance of the seaman's maintenance and cure claim, the efforts of plaintiff's counsel, including his work-product, may become

subject to pre-trial discovery. And if outside counsel is retained to offer expert opinion on the value of plaintiff's attorney's services, all of the documents reviewed by the expert counsel may be subject to a subpoena duces tecum. Inherent in both of these examples is the risk that the attorney-client privilege may be breached. Denial of the right to discovery on this issue prior to trial would probably raise a cry of "prejudice" from opposing counsel. Perhaps most appalling is the thought that plaintiff's counsel himself would be required to testify himself concerning his efforts, in which case he would probably be precluded from trying the merits of the case at all. Again, these practical procedural problems disappear if the White holding is applied to a seaman's maintenance and cure claim since none of the work-product, discovery, expert testimony

or appearance of counsel would become necessary until after trial on the merits, and then, as we began this argument, only "if a seaman proves entitlement to maintenance and cure, and if the Jones Act employer is found to have withheld those benefits wilfully and arbitrarily".

K. Appendix:

Attached is a copy of Holmes v. J. Ray McDermott & Co., Inc., 682 F.2d 1143 (5th Cir. 1982).

Respectfully submitted,

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## C E R T I F I C A T E

I hereby certify that a copy of the foregoing "Petition For Writ Of Certiorari" has been served by hand on Edward J. Koehl, Jr., Esq.

New Orleans, Louisiana,
November 5, 1982.

Bonnie L. Zakotnik

Bonnie L. Zakotnik, Esq.

# APPENDIX "A"

**Harry J. HOLMES, Plaintiff-Appellee,**

**v.**

**J. RAY McDERMOTT & CO., INC.,**
**Defendant-Appellant.**

**No. 81-3486.**

**United States Court of Appeals,**
**Fifth Circuit**

**Aug. 9, 1982.**

A Jones Act suit was brought against employer by employee who sought recovery for back injuries he sustained while working as a rigger on the employer's barge. The United States District Court for the Eastern District of Louisiana, at New Orleans, Fred J. Cassibry, J., entered an award of damages for plaintiff, and defendant appealed. The Court of Appeals, Randall, Circuit Judge, held that: (1) while determination of the amount of attorney's fees may be similar to costs or collateral to the main dispute in some situations, such determination is not collateral to the main issues of a Jones Act suit for arbitrary and willful failure to pay maintenance and cure; it is, rather, an issue relating to the substantive component of the case, and (2) the order appealed from, which did not resolve the amount of attorney's fees, left the amount of a substantive claim undetermined and, thus, was not final and appealable.

Dismissed.

**1. Federal Civil Procedure 2391**

A final judgment is one that terminates the litigation between the parties on the merits and leaves nothing to be done but to enforce by execution what has been determined.

**2. Federal Courts 554**

No appeal lies from a finding of liability on the merits when the district court leaves undetermined the nature and scope of relief.

**3. Federal Civil Procedure 2392**

When attorney's fees are similar to costs or collateral to an action, a lack of determination as to amount does not preclude the issuance of a final, appealable judgment on the merits; when, however, the attorney's fees are an integral part of the merits of the case and the scope of relief, they cannot be characterized as costs or as collateral and their determination is a part of any final, appealable judgment.

**4. Seamen 11(9)**

In an action for arbitrary and willful failure to pay maintenance and cure, attorney's fees are not "similar to costs," but, rather, are an element of damages which may be recovered.

**5. Seamen 11(9)**

**While determination of the amount of attorney's fees may be similar to costs or collateral to the main dispute in some situations, such determination is not collateral to the main issues of a Jones Act suit for arbitrary and willful failure to pay maintenance and cure; it is, rather, an issue relating to the substantive component of the case. Jones Act, 46 U.S.C.A. § 688.**

**6. Federal Courts 597**

**Order appealed from in Jones Act suit left the amount of a substantive claim undetermined and, therefore, was not final and appealable, where, though the jury awarded attorney's fees, it left the amount to the court, which did not yet fix the amount. Jones Act, 46 U.S.C.A. § 688; 28 U.S.C.A. § 1291.**

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**Jones, Walker, Waechter, Poitevent, Carrere & Denegre, Edward J. Koehl, Jr., New Orleans, La., for defendant-appellant.**

**Heisler & Wysocki, James A. Wysocki, New Orleans, La., for plaintiff-appellee.**

**Appeal from the United States District Court for the Eastern District of Louisiana.**

Before CLARK, Chief Judge, POLITZ and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

This action was commenced by Harry Holmes against his employer, J. Ray McDermott & Co., Inc. (McDermott), under the Jones Act, 46 U.S.C. § 688, and general maritime law. Holmes sought to recover for lower-back injuries sustained in 1977 while working as a rigger on a barge owned by McDermott. McDermott appeals from an awrd of damages against it. Because the order appealed from is not a final judgment, we dismiss this appeal for want of jurisdiction.

*I. Procedural History*

The case was tried to a jury. On June 5, 1981, the jury returned a verdict in Holmes' favor. The jury awarded damages, maintenance and cure, and damages for McDermott's willful and arbitrary refusal to pay maintenance and cure. The jury also determined that Holmes was entitled to attorney's fees for the prosecution of the maintenance and cure claim because of McDermott's conduct in denying maintenance and cure. Significant to this appeal, the amount of attorney's fees was left to the court.

On June 9, 1981, the court entered an order captioned "Judgment". The court had not yet decided the size of the attorney's fees award and specifically left that matter

for later determination.[1] McDermott filed a variety of post-trial motions on June 19, but failed to serve them until June 22, 1981. On Holmes' motion, the district court ruled that these motions were not timely served under Federal Rule of Civil Procedure 59(e).[2] The district court therefore dismissed the motions. In the alternative, the district court denied the motions on their merits. McDermott then filed its notice of appeal.[3]

McDermott, although the appellant in this case, calls into question our appellate jurisdiction. McDermott argues that the district court's order of June 9 was not a final, appealable order because, while the jury had awarded attorney's fees, the court had not fixed the amount. If that order was not final, of course, we have no jurisdiction to hear this appeal. 28 U.S.C. § 1291. As a corollary, if the

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[1] The final paragraph of the judgment provided:

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that plaintiff, Harry J. Holmes, recover of the defendant, McDermott, Inc., attorneys' fees relating to maintenance and cure in an amount to be determined by the Court with interest thereon at the legal rate of ten percent (10%) per annum from the date of judgment until paid, and his costs of this action.

[2] Fed.R.Civ.P. 59(e) provides:

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

[3] McDermott's notice of appeal is timely only because the district court granted a thirty-day extension for McDermott to appeal. Holmes moved to dismiss the appeal as untimely, but the district court denied this motion. The court thus implicitly concluded that McDermott's late notice of appeal was due to excusable neglect or good cause. Fed.R.App.P. 4(a)(5).

order of June 9 was not final, the district court erred in ruling that McDermott's post-trial motions were not timely under Rule 59(e).

*II. Finality of the Order for Purposes of Appeal*

*A. Pertinent Case Law*

[1,2] A final judgment is one that "terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis Iron Mountain & Southern Railway v. Southern Express Co.*, 108 U.S. 24, 28-29, 2 S.Ct. 6, 8, 27 L.Ed. 638 (1883). No appeal lies from a finding of liability on the merits when the district court leaves undetermined the nature and scope of relief. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976). Thus we are faced with the legal question whether the lack of determination of the amount of attorney's fees left undetermined any of the "merits" or "scope of relief" in this case.

The United States Supreme Court has recently spoken indirectly to the question before us. In *White v. New Hampshire Department of Employment Security*, ___ U.S. ___, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), the court addressed the question whether a motion to award attorney's fees statutorily authorized by 42 U.S.C. § 1988[4] for an

[4] That statute provides, in relevant part:

In any action or proceeding to enforce a provision of sections 1981, 1982,

action brought under one of the Civil Rights Statutes was a motion to alter or amend a judgment under Fed.R.Civ.P. 59(e).[5] The Court, in its determination that a request for attorney's fees was not covered by Rule 59(e), analyzed the relationship of an award of attorney's fees in civil rights suit to a determination on the merits and the scope of relief in such a case.

In *White*, the plaintiff moved for an award of attorney's fees under § 1988 more than ten days after the entry of a consent decree in a § 1983 suit. The defendant argued that the attorney's fees motion was not timely under Rule 59(e). The Court held that a motion for attorney's fees under § 1988 was not subject to Rule 59(e), and, therefore, could be made more than ten days after the entry of judgment. The Court reasoned that an award of attorney's fees under § 1988 was not integral to the main cause of action. Rather, the award was a collateral matter, independent of the merits of the case and uniquely separable from the cause of action to be proved at trial. *White v. New Hampshire Department of Employment Security*, __ U.S. at __, 102 S.Ct. at 1165-66. The Court concluded:

As the Court of Appeals for the Fifth Circuit recently stated:

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(Footnote 4 continued)
1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C. § 1988.

[5] See not 2, *supra*.

> "[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment..." *Knighton v. Watkins,* 616 F.2d 795, 797 (CA5 1980).

*Id.* at 1166-67 (footnotes omitted).

The question whether a judgment is final when attorney's fees have been awarded but their amount has not been set has also been addressed in various circuit court decisions. The determination of finality has, as was the case in *White,* seemingly hinged upon a circuit court's analysis of whether the award of attorney's fees was, in a particular action, similar to an application for costs, *Johnson v. Snyder,* 639 F.2d 316 (6th Cir. 1981) (judgment final although amount of attorney's fees not yet determined), a part of the relief sought, *Johnson v. University of Bridgeport,* 629 F.2d 828 (2nd Cir. 1980) (judgment not final when amount of attorney's fees not yet determined), or a collateral or independent claim that is neither a part of the relief sought or costs. *Obin v. District No. 9, International Assn. of Machinists and Aerospace Workers,* 651 F.2d 574 (8th Cir. 1981) (judgment final although amount of attorney's fees not yet determined). *See also White v. New Hampshire Department of Employment Security,* __ U.S. at __, 102 S.Ct. at 1165 n.9 (setting forth, circuit by circuit, the various rules relating to finality of the judgment absent a determination of the amount of attorney's fees).

This court has also had occasion to discuss the relationship of attorney's fees to the finality of an order for purposes of appeal. *Jones v. Dealers Tractor and Equipment Company*, 634 F.2d 180 (5th Cir. 1981); *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980); *Williams v. Ezell*, 531 F.2d 1261 (5th Cir. 1976); *Stacy v. Williams*, 446 F.2d 1366 (5th Cir. 1971). In *Jones* and *Knighton*, we held, consistent with the Supreme Court's later decision in *White*, that Fed.R.Civ.P. 59(e) is inapplicable to a request for attorney's fees under the Civil Rights Attorney Fees Award Act. 42 U.S.C. § 1988. We reasoned:

> *Because this statute designates attorney's fees as part of the costs*, they will ordinarily be sought only after litigation. *See Gore v. Turner*, 563 F.2d 159, 163 (5th Cir. 1978).

*Jones v. Dealers Tractor and Equipment Co.*, 634 F.2d at 181-82 (emphasis added). In *Williams v. Ezell*, we held that an order granting a motion for attorney's fees but reserving the determination of their amount is not a final order for purposes of appeal.[6] In *Stacy v. Williams*, finding that the attorney's fees were part of the "relief" requested, we held that a motion for attorney's fees was a motion to alter a judgment and subject to the stricture of Rule 59(e).

[3] Thus, while we have not articulated in detail our rationale for holding that an undetermined amount of at-

[6] We then held that the district court lacked power to deny plaintiff's voluntary dismissal of his case, and, therefore, the court had no jurisdiction to award attorney's fees.

torney's fees may pretermit a final judgment in some cases (*Stacy*) but not in others (*Jones*), the applicable rationale, as derived from pertinent case law, is clear. When attorney's fees are similar to costs (*White*) or collateral to an action (*Obin*), a lack of determination as to the amount does not preclude the issuance of a final, appealable judgment on the merits. When, however, the attorney's fees are an integral part of the merits of the case and the scope of relief, they cannot be characterized as costs or as collateral and their determination is a part of any final, appealable judgment. The final task for us, then, is to determine the appropriate characterization of the attorney's fees award in this maintenance and cure action.

*B. Applicability of the Law to These Facts*

[4] Holmes describes the award of attorney's fees here as "similar to costs." If that were the case, our decision might be materially different. However, in an action for arbitrary and willful failure to pay maintenance and cure, attorney's fees are not "similar to costs," at all but rather are an element of damages which may be recovered. As the Supreme Court stated in its seminal decision allowing an award of attorney's fees in an action for maintenance and cure:

> *Nor do we have the usual problem of what constitutes "costs" in the conventional sense. Cf. The Baltimore,* 8 Wall. 377 [19 L.Ed. 463]. *Our question concerns damages.* Counsel fees were allowed in *The Apollon,* 9 Wheat. 362, 379 [6 L.Ed. 111], an admiralty suit where one party was

> put to expense in recovering demurrage of a vessel wrongfully seized. While failure to give maintenance and cure may give rise to a claim for damages for the suffering and for the physical handicap which follows (*The Iroquois*, 194 U.S. 240 [24 S.Ct. 640, 48 L.Ed. 955]), the recovery may also include "necessary expenses." *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371 [53 S.Ct. 173, 174, 77 L.Ed. 368].
>
> In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, *libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.*

*Vaughan v. Atkinson*, 369 U.S. 527, 530, 82 S.Ct. 997, 999, 8 L.Ed.2d 88 (1962) (emphasis added).

Additionally, we emphasize two critical facts that indicate that the attorney's fees were integral to the determination of the merits of the action. First, Holmes requested the attorney's fees as part of his damages for McDermott's arbitrary and willful failure to pay maintenance and cure, and this requested relief was included in the pretrial order. Second, the jury was charged on the issue of attorney's fees and the jury returned a verdict awarding them.

Moreover, the Supreme Court in *White* distinguish-

ed the case before it from the type with which we are faced today.

> *Unlike other judicial relief, the attorney's fees allowed under* § 1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial. See *Hutto v. Finney*, 437 U.S. 678, 695 n.24, 98 S.Ct. 2565, 2576 n.24, 57 L.Ed.2d 522 (1978).

*White v. New Hampshire Department of Employment Security*, __ U.S. at __, 102 S.Ct. at 1165 (emphasis added).[7] Here, in contrast, the award of attorney's fees to Holmes was an element of damages for McDermott's willful and arbitrary denial of maintenance and cure. *Vaughan v. Atkinson, supra.* The attorney's fees award, therefore, was not uniquely separable from the merits but was bound hand in hand with them. The jury was instructed to consider awarding attorney's fees only if it found that the denial of maintenance and cure was willful

[7] We recognize that the Supreme Court stated in *White* that "fee questions are not inherently or necessarily subsumed by a decision on the merits." 102 S.Ct. at 1166, n.13. *Vaughan v. Atkinson, supra*, makes it clear, however, that attorney's fees in a maintenance and cure action are "subsumed by the merits." The conclusion that *White* reached on § 1988 attorney's fees requests does not establish a general rule on attorney's fees requests, nor does it dictate the result here with respect to attorney's fees awards made as an element of damages under maritime law. Moreover, the concern of the Court in *White*, that because in civil rights cases, there may be "many final orders," 102 S.Ct. at 1167, relating to "relief of an injunctive nature," *id.*, it "may be unclear even to counsel which orders are and which are not 'final judgments,' " *id.*, seems less persuasive here as this type of maritime suit does not contemplate injunctive relief or portend the issuance of numerous "final" orders.

and arbitrary. Moreover, the maintenance and cure issue is the only one on which attorney's fees were awarded. Thus, the considerations that the Supreme Court found controlling in a motion for § 1988 attorney's fees do not apply here.[8] *Cf. Stacy v. Williams*, 446 F.2d at 1367 (per curiam) (a motion for attorney's fees because of opponent's bad faith in prolonging litigation is a component of substantive relief, and, therefore, the motion must be made either before judgment or within ten days of judgment as required by Fed.R.Civ.P. 59(e)).[9]

We simply cannot distinguish this case from any other judgment of liability that leaves undetermined the relief as to the amount of damages to which the plaintiff is entitled. The policies against piecemeal appeals apply fully to such aq situation; they are also applicable here. *Cf. Security & Exchange Commission v. Independence Drilling Co.*, 595 F.2d 1006 (5th Cir. 1979) (district court's order

[8] Our decision in *Knighton v. Watkins, supra*, differs from *White* only in holding that § 1988 makes attorney's fees an element of costs, and, therefore, motions for § 1988 attorney's fees are subject to Fed.R.Civ.P. 54(d) and 58 on costs. The Supreme Court did not reach this issue. *Knighton*, like *White*, is concerned with the unique aspects of § 1988 attorney's fees. Thus, *Knighton*'s differences from *White* do not affect our analysis of this case.

[9] Holmes makes a second legal argument for finality. Holmes argues that *Lipscomb v. Wise*, 643 F.2d 319 (5th Cir. 1981), adopts the view that attorney's fees are always collateral to the merits of the case. It follows, Holmes argues, that a judgment on attorney's fees is final without determination of the quantity of fees due. In *Lipscomb*, the district court denied attorney's fees to attorneys who represented intervenors in a voting rights case. The judgment appealed from was final as to all parties. We held that the attorneys themselves had standing to appeal the denial of fees. We see nothing in this decision to support Holmes' argument for finality here.

that the SEC pay for the costs of a receivership was not final until the Commission's liability had been given a dollar amount).

[5,6] In sum, while we recognize that determination of the amount of attorney's fees may be similar to costs, *Knighton v. Watkins, supra*, or collateral to the main dispute in a case in some situations, *see Odin v. District No. 9 of the International Association of Machinists and Aerospace Workers, supra*, in an action for arbitrary and willful failure to pay maintenance and cure we hold that such determination is not *collateral* to the main issues of the case but an issue relating to the substantive component of the case. The order appealed from which left the amount of a substantive claim undetermined[10] is not final and we have no jurisdiction to hear this appeal.

DISMISSED.

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[10] At oral argument, Holmes asserted that the fact that the judge, rather than the jury, was to determine the *amount* of fees awarded by the jury as damages indicated that the award of attorney's fees was collateral under the rubric of *White*. However, Holmes also admitted that, at least in some maintenance and cure cases, juries awarded the specific amount of attorney's fees. Simply because the parties agreed here to allow the judge (rather than the jury) to fix the amount, we do not believe that the question of attorney's fees becomes less a part of the merits of the case. We do not think the timing of the determination of the amount or whether the parties have agreed that a judge (rather than a jury) should determine the amount is controlling in our analysis. Rather it is the fact that the attorney's fees are an integral part of the merits that is critical to our determination that, absent a determination of the amount of this element of damages, there has been no final, appealable judgment. Nor do we reach the issue whether the determination of the amount by the judge (rather than the jury) was proper as it has not been presented to us on appeal.